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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

8 STEPHEN ESCONDON MEDINA,
9 CDCR #E-63667,

10 Plaintiff,

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12 vs.
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15 CORRECTIONAL OFFICER R. HUESO;
16 CORRECTIONAL OFFICER CASTONE,

17 Defendants.
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Civil No. 08-0896 JLS (RBB)

ORDER:

- (1) **DENYING MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3];**
- (2) **GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE, GARNISHING \$350 FROM PRISONER'S TRUST ACCOUNT [Doc. No. 2]; and**
- (3) **DIRECTING U.S. MARSHAL TO EFFECT SERVICE OF SUMMONS AND COMPLAINT PURSUANT TO FED.R.CIV.P. 4(c)(2) AND 28 U.S.C. § 1915(d)**

23 Stephen Escondon Medina ("Plaintiff"), a prisoner currently incarcerated at Calipatria
24 State Prison located in Calipatria, California, and proceeding pro se, has submitted a civil rights
25 Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated
26 by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP")
27 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for Appointment of Counsel
28 [Doc. No. 3].

I.

Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in installments, regardless of whether the action is ultimately dismissed for any reason. See 28 U.S.C. § 1915(b)(1) & (2).

11 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
12 § 1915(a)(1), and has attached a certified copy of his trust account statement pursuant to 28
13 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. The Court has now reviewed Plaintiff's trust
14 account statement and finds that Plaintiff has insufficient funds from which to pay any initial
15 filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
16 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
17 reason that the prisoner has no assets and no means by which to pay the initial partial filing
18 fee.”); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28 U.S.C.
19 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely
20 on a “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

21 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and
22 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
23 orders the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”)
24 to garnish the \$350 balance of the filing fees owed in this case, collect and forward them to the
25 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
26 § 1915(b)(1).

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II.

Motion for Appointment of Counsel

Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

14 The Court denies Plaintiff's request without prejudice, as neither the interests of justice
15 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
16 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

III.

Sua Sponte Screening per 28 U.S.C. §§ 1915(e) and 1915A

19 The PLRA also obligates the Court to review complaints filed by all persons proceeding
20 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
21 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
22 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
23 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
24 provisions, the Court must sua sponte dismiss complaints, or any portions thereof, which are
25 frivolous, malicious, fail to state a claim, or which seek damages from defendants who are
26 immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27
27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
28 (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing

1 § 1915A). “[W]hen determining whether a complaint states a claim, a court must accept as true
 2 all allegations of material fact and must construe those facts in the light most favorable to the
 3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

5 Here, the Court finds that the allegations in Plaintiff’s Complaint are sufficient to survive
 6 the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff
 7 is entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C.
 8 § 1915(d) (“The officers of the court shall issue and serve all process, and perform all duties in
 9 [IFP] cases.”); FED.R.CIV.P. 4(c)(2) (providing that “service be effected by a United States
 10 marshal, deputy Untied States marshal, or other officer specially appointed by the court ... when
 11 the plaintiff is authorized to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.”). Plaintiff
 12 is cautioned, however, that “the sua sponte screening and dismissal procedure is cumulative of,
 13 and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to
 14 bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

15 IV.

16 Conclusion and Order

17 Good cause appearing, **IT IS HEREBY ORDERED** that:

18 1. Plaintiff’s Motion for Appointment of Counsel is **DENIED** [Doc. No. 3] without
 19 prejudice;

20 2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 21 is **GRANTED**.

22 3. The Secretary of California Department of Corrections and Rehabilitation, or his
 23 designee, is ordered to collect from Plaintiff’s prison trust account the \$350 balance of the filing
 24 fee owed in this case by collecting monthly payments from the trust account in an amount equal
 25 to twenty percent (20%) of the preceding month’s income credited to the account and forward
 26 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
 27 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
 28 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

1 4. The Clerk of the Court is directed to serve a copy of this order on Matthew Cate,
2 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
3 Sacramento, California 94283-0001.

4 **IT IS FURTHER ORDERED** that:

5 5. The Clerk shall issue a summons upon Defendants and forward it to Plaintiff along
6 with a blank U.S. Marshal Form 285 for each of these Defendants. In addition, the Clerk shall
7 provide Plaintiff with a certified copy of this Order, and certified copies of his Complaint and
8 the summons for purposes of serving each of these Defendants. Upon receipt of this "IFP
9 Package," Plaintiff is directed to complete the Form 285s as completely and accurately as
10 possible, and to return them to the United States Marshal according to the instructions provided
11 by the Clerk in the letter accompanying his IFP package. Thereafter, the U.S. Marshal shall
12 serve a copy of the Complaint and summons upon each Defendant as directed by Plaintiff on
13 each Form 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C.
14 § 1915(d); FED.R.CIV.P. 4(c)(2).

15 6. Defendants are thereafter **ORDERED** to reply to the Complaint within the time
16 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C.
17 § 1997e(g)(2) (while Defendants may occasionally be permitted to "waive the right to reply to
18 any action brought by a prisoner confined in any jail, prison, or other correctional facility under
19 section 1983," once the Court has conducted its *sua sponte* screening pursuant to 28 U.S.C.
20 § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on the face
21 on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits,"
22 Defendants are required to respond).

23 7. Plaintiff shall serve upon Defendants or, if appearance has been entered by
24 counsel, upon Defendants' counsel, a copy of every further pleading or other document
25 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
26 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
27 of any document was served on Defendants, or counsel for Defendants, and the date of service.

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1 Any paper received by the Court which has not been filed with the Clerk or which fails to
2 include a Certificate of Service will be disregarded.

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5 DATED: June 9, 2008

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge

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